

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CLAY MERRITT BURGON,

Petitioner,

v.

BRIAN WILLIAMS, SR., *et al.*,

Respondents.

Case No. 2:14-cv-01128-RFB-DJA

ORDER

I. Introduction

This action is a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by Clay Merritt Burgon, a Nevada prisoner. The case is before the Court for adjudication of the claims remaining in Burgon's amended habeas petition. The Court will deny Burgon's petition, deny him a certificate of appealability, and direct the Clerk of the Court to enter judgment accordingly.

II. Background

Police reports reveal the events that gave rise to the criminal charges against Burgon. See Justice Court Records, Exh. 1 (ECF No. 9-1, pp. 3–8). According to the police reports, on July 13, 2010, at approximately 1:25 a.m., an individual later identified as Burgon, wearing a red shirt or jacket and a nylon stocking over his face, and carrying a black backpack, entered a convenience store in Las Vegas, pointed a black semi-automatic handgun at the store clerk, and told him to put cigarettes into a black trash bag

1 and money from the register into the black backpack. See id. The store clerk complied,
2 and Burgon left in a newer silver Mitsubishi SUV. See id. About twenty minutes later,
3 police officers spotted a vehicle matching the description of the one in which Burgon left
4 the scene of the robbery and activated their emergency lights. See id. Burgon took off
5 and attempted to evade the police officers, reaching speeds of approximately 80 miles
6 per hour, before crashing into a wall. See id. Burgon exited the vehicle carrying the black
7 backpack and ran; the officers pursued Burgon on foot, caught him, and arrested him.
8 See id. The black backpack contained a black semi-automatic handgun, an opened
9 carton of cigarettes, a red jacket, and a nylon stocking. See id. A black plastic trash bag
10 containing cigarettes consistent with those taken in the robbery was found in the vehicle
11 Burgon was driving. See id. Burgon had \$111 in cash, an amount consistent with that
12 taken in the robbery, in his pocket. *See id.* The police viewed video footage from the
13 scene of the robbery and positively identified Burgon as the perpetrator. See id.

14 On July 15, 2010, Burgon was charged in a criminal complaint with four felonies:
15 robbery with use of a deadly weapon, possession of firearm by ex-felon, burglary, and
16 stop required on signal of police officer. See Criminal Complaint, Exh. 2 (ECF No. 9-2).
17 The criminal complaint was subsequently amended to change the charge of burglary to
18 burglary while in possession of a firearm. See Amended Criminal Complaint, Exh. 3 (ECF
19 No. 9-3). Burgon waived his right to a preliminary hearing and was bound over to the
20 district court to answer for the charges. See Reporter's Transcript of Unconditional Waiver
21 of Preliminary Hearing, July 29, 2010, Exh. 4 (ECF No. 9-4); Bindover and Order to
22 Appear, Exh. 5 (ECF No. 9-5).

23 On August 6, 2010, Burgon was charged in the district court by information with
24 robbery with use of a deadly weapon, burglary while in possession of a firearm, failure to
25 stop on signal of a police officer, and ex-felon in possession of a firearm. See Information,
26 Exh. 10 (ECF No. 9-10); Second Amended Information, Exh.18 (ECF No. 9-18). On
27 March 3, 2011, Burgon agreed to plead guilty to robbery with use of a deadly weapon and
28 burglary while in possession of a firearm, and, in return the State agreed not to pursue

1 the other charges. See Guilty Plea Agreement, Exh. 19 (ECF No. 9-19). Burgon entered
2 his guilty plea on that same date. See Reporter's Transcript of Plea, Exh. 20 (ECF No. 9-
3 20). Burgon was sentenced on May 5, 2011. See Reporter's Transcript of Sentencing,
4 Exh. 21 (ECF No. 9-21). The State presented evidence that Burgon had been convicted
5 of armed bank robbery in 2000 and robbery in 2005, and Burgon was sentenced under
6 Nevada's habitual criminal sentencing laws to two consecutive terms of life in prison with
7 the possibility of parole after ten years. See id. The judgment of conviction was entered
8 May 12, 2011. See Judgment of Conviction, Exh. 23 (ECF No. 9-23).

9 Burgon filed a notice of appeal on August 26, 2011. See Notice of Appeal, Exh. 24
10 (ECF No. 10). The appeal was dismissed on September 16, 2011, because the notice of
11 appeal was untimely. See Order Dismissing Appeal, Exh. 28 (ECF No. 10-4).

12 On February 21, 2012, Burgon filed, in the state district court, a *pro se* petition for
13 writ of habeas corpus. See Petition for Writ of Habeas Corpus, Exh. 34 (ECF No. 10-10).
14 Counsel was appointed, and, with counsel, Burgon filed a supplement to the petition on
15 October 19, 2012. See Supplemental Brief in Support of Petition for Writ of Habeas
16 Corpus, Exh. 42 (ECF No. 10-18). The state district court denied the petition in a written
17 order filed on April 19, 2013. See Findings of Fact, Conclusions of Law and Order, Exh.
18 47 (ECF No. 11-1). Burgon appealed. See Appellant's Opening Brief, Exh. 59 (ECF No.
19 11-13). The Nevada Supreme Court affirmed on May 13, 2014. See Order of Affirmance,
20 Exh. 64 (ECF No. 11-18).

21 This Court received Burgon's *pro se* federal habeas petition, initiating this
22 action, on July 9, 2014 (ECF No. 6).

23 On May 13, 2015, respondents filed a motion to dismiss (ECF No. 8). Burgon
24 responded with a motion for stay (ECF No. 19). On March 31, 2016, in light of the briefing
25 of the motion to dismiss and motion for stay, the Court appointed counsel for Burgon, and
26 denied the motions without prejudice. See Order entered March 31, 2016 (ECF No. 24).

1 Counsel appeared for Burgon (ECF No. 25) and filed an amended petition—now
2 the operative petition in the case—on his behalf on April 11, 2017 (ECF No. 36). Burgon’s
3 amended petition asserts the following claims:

4 Ground 1(1): Burgon received ineffective assistance of his trial
5 counsel in violation of his federal constitutional rights, because Burgon’s
6 trial counsel failed to participate in his presentence interview and failed to
prepare him for the presentence interview.

7 Ground 1(2): Burgon received ineffective assistance of his trial
8 counsel in violation of his federal constitutional rights, because Burgon’s
trial counsel failed to investigate Burgon’s available defenses.

9 Ground 2: Burgon received ineffective assistance of his trial counsel
10 in violation of his federal constitutional rights, because Burgon’s trial
counsel failed “to investigate Burgon’s mental health and substance abuse
history to negotiate a more favorable plea offer.”

11 Ground 3(1): Burgon received ineffective assistance of his trial
12 counsel in violation of his federal constitutional rights, because Burgon’s
13 trial counsel failed “to advise Burgon about the mandatory violent habitual
felon statute.”

14 Ground 3(2): Burgon received ineffective assistance of his trial
15 counsel in violation of his federal constitutional rights, because Burgon’s
trial counsel failed “to object to the State’s proffer of evidence regarding
Burgon’s two prior convictions.”

16 Ground 4: Burgon did not enter his guilty plea knowingly, intelligently
17 or voluntarily, in violation of his federal constitutional rights.

18 Ground 5: Burgon received ineffective assistance of his trial counsel
19 in violation of his federal constitutional rights, because Burgon’s trial
20 counsel failed “to file a notice of appeal, preserve Mr. Burgon’s right to a
direct appeal, and advise Mr. Burgon correctly regarding his appellate
rights.”

21 Ground 6: Burgon received ineffective assistance of his trial counsel
22 in violation of his federal constitutional rights, because Burgon’s trial
counsel failed “to advise him against unconditionally waiving his preliminary
hearing without plea negotiations pending.”

23 Amended Petition (ECF No. 36), pp. 16–33.

24 On August 1, 2017 Respondents filed a motion to dismiss the amended petition
25 (ECF No. 46). Respondents argued that certain of Burgon’s claims are barred by the
26 statute of limitations, that certain of his claims are unexhausted in state court, and that
27 certain of his claims are barred by the rule of Tollett v. Henderson, 411 U.S. 258 (1973).
28 The Court ruled on that motion on March 19, 2018, dismissing one of Burgon’s claims—

Ground 3(2)—on statute of limitations grounds, and denying the motion in all other respects. The Court’s ruling was without prejudice to Respondents asserting a procedural default defense, or their Tollett defense, in their answer. See Order entered March 19, 2018 (ECF No. 58).

Respondents filed an answer, responding to Burgon’s remaining claims, on December 3, 2018 (ECF No. 73). Burgon filed a reply on April 17, 2019 (ECF No. 79). Respondents filed a response to the reply on July 1, 2019 (ECF No. 84).

III. Discussion

A. Standard of Review

28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas corpus cases under the Antiterrorism and Effective Death Penalty Act (AEDPA):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d)(1), “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.” Lockyer v. Andrade, 538 U.S. 63, 73 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 405–06 (2000), and citing Bell v. Cone, 535 U.S. 685, 694 (2002)).

A state court decision is an unreasonable application of clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254(d)(1), “if the state

1 court identifies the correct governing legal principle from [the Supreme Court's] decisions
 2 but unreasonably applies that principle to the facts of the prisoner's case." Lockyer, 538
 3 U.S. at 75 (quoting Williams, 529 U.S. at 413). The "unreasonable application" clause
 4 requires the state court decision to be more than incorrect or erroneous; the state court's
 5 application of clearly established law must be objectively unreasonable. Id. (quoting
 6 Williams, 529 U.S. at 409). The Supreme Court has instructed that, under § 2254(d)(2),
 7 "[a] state court's determination that a claim lacks merit precludes federal habeas relief so
 8 long as 'fairminded jurists could disagree' on the correctness of the state court's decision."
 9 Harrington v. Richter, 562 U.S. 86, 101 (2011) (citing Yarborough v. Alvarado, 541 U.S.
 10 652, 664 (2004)). "[E]ven a strong case for relief does not mean the state court's contrary
 11 conclusion was unreasonable." Id. at 102 (citing Lockyer, 538 U.S. at 75); see also Cullen
 12 v. Pinholster, 563 U.S. 170, 181 (2011) (describing standard as "a difficult to meet" and
 13 "highly deferential standard for evaluating state-court rulings, which demands that state-
 14 court decisions be given the benefit of the doubt" (internal quotation marks and citations
 15 omitted)).

16 Where the state courts have denied a claim on the merits, but have provided no
 17 explanation for the ruling, the standard prescribed by section 2254(d) still applies; in such
 18 case, the petitioner bears the burden of showing that there was no reasonable basis for
 19 the state court's ruling. See Harrington, 562 U.S. at 98.

20 On the other hand, if the state courts did not rule on the merits of a claim, "federal
 21 habeas review is not subject to the deferential standard that applies under AEDPA to 'any
 22 claim that was adjudicated on the merits in State court proceedings.'" Cone v. Bell, 556
 23 U.S. 449, 472 (2009) (quoting 28 U.S.C. § 2254(d)). In that case, the federal habeas court
 24 reviews the claim *de novo*. Id. at 472; Scott v. Ryan, 686 F.3d 1130, 1133 (9th Cir. 2012);
 25 Pirtle v. Morgan, 313 F.3d 1160, 1167–68 and n.4 (9th Cir. 2002).

26 B. Ground 1(1)

27 In Ground 1(1), Burgon claims that he received ineffective assistance of his trial
 28 counsel in violation of his federal constitutional rights, because his trial counsel failed to

1 participate in his presentence interview and failed to prepare him for the presentence
2 interview. Amended Petition (ECF No. 36), p. 16. More specifically, Burgon claims:

3 As set forth [in preceding portions of the amended petition], and
4 hereby incorporated herein, Burgon suffered (and continues to suffer) from
5 several mental disorders. [Citations omitted.] Given Burgon's history of
6 mental disorders, including visual and auditory hallucinations, as well as his
7 use (and abuse) of prescription medication and illicit drugs, trial counsel
8 should have been present during Burgon's presentence interview. At
9 minimum, he should have helped him prepare for the interview, given the
lengthy mandatory sentence of ten to twenty-five years, ten years to life, or
life without the possibility of parole that Burgon was facing. The presentence
interview was yet another opportunity for trial counsel to investigate and
present information about Burgon's mental illness and substance abuse to
the probation office and the court in mitigation for sentencing.

10 Id.

11 In the ruling on the motion to dismiss, this Court found that Burgon did not fairly
12 present this claim in state court. See Order entered March 19, 2018 (ECF No. 58),
13 pp. 7-8. The Court determined, however, that if Burgon were to return to state court to
14 exhaust his unexhausted claims, those claims would be procedurally barred in state court,
15 as untimely and successive, pursuant to NRS §§ 34.726 and 34.810. See id. at 12–14.
16 The Court, therefore, considers claims raised in this case but not in state court, including
17 this claim, to be technically exhausted, but procedurally defaulted.

18 In Coleman v. Thompson, the Supreme Court held that a state prisoner who fails
19 to comply with the state's procedural requirements in presenting his claims is barred from
20 obtaining a writ of habeas corpus in federal court by the adequate and independent state
21 ground doctrine. Coleman v. Thompson, 501 U.S. 722, 731–32 (1991) (“Just as in those
22 cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who
23 has failed to meet the State's procedural requirements for presenting his federal claims
24 has deprived the state courts of an opportunity to address those claims in the first
25 instance.”). Where such a procedural default constitutes an adequate and independent
26 state ground for denial of habeas corpus, the default may be excused only if “a
27 constitutional violation has probably resulted in the conviction of one who is actually
28 innocent,” or if the prisoner demonstrates cause for the default and prejudice resulting

1 from it. Murray v. Carrier, 477 U.S. 478, 496 (1986). To demonstrate cause for a
 2 procedural default, the petitioner must “show that some objective factor external to the
 3 defense impeded” his efforts to comply with the state procedural rule. Murray, 477 U.S.
 4 at 488. For cause to exist, the external impediment must have prevented the petitioner
 5 from raising the claim. See McCleskey v. Zant, 499 U.S. 467, 497 (1991). With respect to
 6 the prejudice prong, the petitioner bears “the burden of showing not merely that the errors
 7 [complained of] constituted a possibility of prejudice, but that they worked to his actual
 8 and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional
 9 dimension.” White v. Lewis, 874 F.2d 599, 603 (9th Cir. 1989), citing United States v.
 10 Fraday, 456 U.S. 152, 170 (1982).

11 In Martinez v. Ryan, 566 U.S. 1 (2012), the Supreme Court ruled that ineffective
 12 assistance of post-conviction counsel may serve as cause, to overcome the procedural
 13 default of a claim of ineffective assistance of trial counsel. In Martinez, the Supreme Court
 14 noted that it had previously held, in Coleman, that “an attorney’s negligence in a
 15 postconviction proceeding does not establish cause” to excuse a procedural default.
 16 Martinez, 566 U.S. at 15. The Martinez Court, however, “qualif[ied] Coleman by
 17 recognizing a narrow exception: inadequate assistance of counsel at initial-review
 18 collateral proceedings may establish cause for a prisoner’s procedural default of a claim
 19 of ineffective assistance at trial.” Id. at 9. The Court described “initial-review collateral
 20 proceedings” as “collateral proceedings which provide the first occasion to raise a claim
 21 of ineffective assistance at trial.” Id. at 8.

22 This Court determined, in ruling on the motion to dismiss, that Burgon’s arguments
 23 based on Martinez raised the question of the merits of Burgon’s claims; therefore, the
 24 resolution of procedural default issues was deferred until after Respondents filed an
 25 answer, and Burgon a reply.

26 Turning to the legal standards governing a claim of ineffective assistance of
 27 counsel, in Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court
 28 propounded a two prong test: the petitioner must demonstrate (1) that the attorney’s

1 representation “fell below an objective standard of reasonableness,” and (2) that the
2 attorney’s deficient performance prejudiced the defendant such that “there is a
3 reasonable probability that, but for counsel’s unprofessional errors, the result of the
4 proceeding would have been different.” Strickland, 466 U.S. at 688, 694. A court
5 considering a claim of ineffective assistance of counsel must apply a “strong presumption”
6 that counsel’s representation was within the “wide range” of reasonable professional
7 assistance. Id. at 689. The petitioner’s burden is to show “that counsel made errors so
8 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by
9 the Sixth Amendment.” Id. at 687. And, to establish prejudice under Strickland, it is not
10 enough for the habeas petitioner “to show that the errors had some conceivable effect on
11 the outcome of the proceeding.” Id. at 693. In analyzing a claim of ineffective assistance
12 of counsel under Strickland, a court may first consider either the question of deficient
13 performance or the question of prejudice; if the petitioner fails to satisfy one element of
14 the claim, the court need not consider the other. See Strickland, 466 U.S. at 697.

15 Returning to the analysis of Ground 1(1), the Court determines that Burgon does
16 not make any showing of prejudice from his trial counsel not participating in his
17 presentence interview and preparing him for that interview, or from his state post-
18 conviction counsel’s failure to raise this claim. Burgon claims that the presentence
19 interview was an opportunity to present the probation office, and the sentencing court,
20 with information about his mental illness and history of substance abuse. See Reply (ECF
21 No. 79), p. 7. However, the presentence investigation report reflects that the probation
22 office did, in fact, receive extensive information about Burgon’s mental illness and
23 substance abuse, and that information was included in the report. See Presentence
24 Investigation Report, Exh. 73 (ECF No. 39-5) (filed under seal). Burgon admits, in setting
25 forth another ground of his amended petition:

26 At the sentencing hearing, the State acknowledged that the mental
27 health issues that caused Burgon to commit the crime were in fact raised in
28 letters and the presentence investigation report that was presented to the
trial court. (ECF No. 9-21, Ex. 21, at 6:2–6:4.) Trial counsel also informed

1 the trial court about Burgon's medical and mental conditions, and asked the
2 court to impose a concurrent sentence as a result. *Id.* at 7:10–9:17.)

3 Amended Petition (ECF No. 36), p. 18.

4 Burgon does not show a reasonable probability of a better outcome at sentencing
5 if further information regarding these matters had been presented. The Court determines
6 that Burgon's state post-conviction counsel was not ineffective for failing to raise this
7 claim. Burgon has not made a showing of cause and prejudice under *Martinez*. Ground
8 1(1) will be denied as procedurally defaulted.

9 C. Ground 1(2)

10 In Ground 1(2), Burgon claims that he received ineffective assistance of his trial
11 counsel in violation of his federal constitutional rights, because his trial counsel failed to
12 investigate available defenses. See Amended Petition (ECF No. 36), pp. 17–18. More
13 specifically, Burgon claims that his trial counsel failed to investigate the possibility of a
14 diminished capacity defense or an insanity defense. See *id.* at 17. Burgon claims that had
15 his counsel investigated those defenses, and properly advised Burgon about them,
16 "Burgon could have plead not guilty by reason of insanity pursuant to Nev. Rev. Stat. §
17 174.035(5) and opted to proceed to trial," or "[a]t minimum, trial counsel should have
18 advised Burgon to plead guilty but mentally ill pursuant to Nev. Rev. Stat. § 174.035." *Id.*

19 In the ruling on the motion to dismiss, this Court found that Burgon did not fairly
20 present this claim in state court. See Order entered March 19, 2018 (ECFR No. 58), pp.
21 8–9. Therefore, this claim is potentially subject to denial as procedurally defaulted unless
22 Burgon shows cause and prejudice on account of ineffective assistance of his state post-
23 conviction counsel, under *Martinez*.

24 Under Nevada law, criminal defendants are presumed to be legally sane, and, to
25 prevail with an insanity defense, must overcome that presumption with a preponderance
26 of the evidence. See Williams v. State, 110 Nev. 1182, 1185, 885 P.2d 536, 538 (1994).
27 Nevada recognizes the defense of legal insanity and applies the M'Naughten test. See,
28 e.g., Miller v. State, 911 P.2d 1183, 1185 (1996). "To qualify as being legally insane, a
defendant must be in a delusional state such that he cannot know or understand the

1 nature and capacity of his act, or his delusion must be such that he cannot appreciate the
2 wrongfulness of his act, that is, that the act is not authorized by law.” Finger v. State, 27
3 P.3d 66, 84–85 (2001).

4 According to the police reports, Burgon wore a stocking over his head when he
5 entered the convenience store to rob it, and, after the robbery, led the police on a high-
6 speed chase followed by a foot chase in an attempt to avoid arrest. Burgon makes no
7 allegation that these aspects of the police reports are untrue. Given these circumstances,
8 it is inconceivable that Burgon could have shown that, because of mental illness or
9 substance abuse, he did not understand the nature and capacity of his acts, or their
10 wrongfulness, or could not have formed the required *mens rea*. Burgon does not make
11 any showing suggesting that any further investigation by trial counsel would have made
12 any difference in this regard, such that Burgon would not have pled guilty. See Hill v.
13 Lockhart, 474 U.S. 52, 59 (1985) (In context of guilty plea, Strickland prejudice prong
14 requires petitioner to demonstrate “that there is a reasonable probability that, but for
15 counsel’s errors, he would not have pleaded guilty and would have insisted on going to
16 trial.”). And, with regard to Burgon’s claim that his trial counsel was ineffective for not
17 advising him to plead guilty but mentally ill under NRS § 174.035, Burgon has not shown
18 that he would have so pled if advised about such a plea by counsel, he has not shown
19 that such a plea would have been available as part of a plea bargain, and he has not
20 made any showing how he might have benefitted from such a plea at any rate. See NRS
21 § 174.035(5) (“Except as otherwise provided by specific statute, a defendant who enters
22 such a plea is subject to the same criminal, civil and administrative penalties and
23 procedures as a defendant who pleads guilty.”). In short, the Court finds the claim in
24 Ground 1(2) to be insubstantial.

25 As this claim is insubstantial, the Court determines that Burgon’s state post-
26 conviction counsel was not ineffective for failing to assert it, and Burgon has not shown
27 cause and prejudice to overcome the procedural default. See Martinez, 566 US at 14, 17
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1 (Under Martinez, to show cause and prejudice, petitioner must show that the underlying
2 claim has some merit). Ground 1(2) will be denied on procedural default grounds.

3 D. Ground 2

4 In Ground 2, Burgon claims that he received ineffective assistance of his trial
5 counsel in violation of his federal constitutional rights, because his trial counsel failed “to
6 investigate Burgon’s mental health and substance abuse history to negotiate a more
7 favorable plea offer.” See Amended Petition (ECF No. 36), pp. 18–22.

8 Burgon asserted this claim in state court, and the Nevada Supreme Court affirmed
9 the denial relief on the claim, as follows:

10 ... [A]ppellant argues that his trial counsel was ineffective for failing
11 to investigate appellant’s mental health and substance abuse history and
12 secure a favorable plea negotiation. Appellant fails to demonstrate that his
13 trial counsel’s performance was deficient or that he was prejudiced. The
14 premise of this claim is entirely speculative. As noted above, the documents
15 before this court indicate that trial counsel was aware prior to entry of the
16 plea of appellant’s mental health issues. Appellant fails to demonstrate that
17 there was a reasonable probability of a favorable plea negotiation had trial
18 counsel presented appellant’s mental health and substance abuse history
19 to the prosecutor. Therefore, the district court did not err in denying this
20 claim without an evidentiary hearing.

21 Order of Affirmance, Exh. 64, p. 4 (ECF No. 11-18, p. 5).

22 This Court determines that the Nevada Supreme Court’s analysis, concluding that
23 Burgon does not show prejudice from his trial counsel alleged failure to adequately
24 investigate his case, is reasonable. Burgon’s argument is that if trial counsel had
25 conducted an adequate investigation, he could have procured a better plea agreement
26 for Burgon. See Reply (ECF No. 79), pp. 33–35.

27 The Court finds the Nevada Supreme Court’s conclusion that such an effort would
28 be entirely speculative to be a clearly unreasonable application of extant law. Trial
counsel has a duty to adequately investigate the mental health symptoms of a defendant.
Douglas v. Woodford, 316 F.3d 1079, 1085 (9th Cir. 2003). The record indicates that
although trial counsel did in fact hire a licensed psychologist to conduct an examination,
there was no independent investigation in to Burgon’s mental health status, medications

1 and substance abuse. The Court therefore agrees with Petitioner that trial counsel's
2 investigation was insufficient.

3 However, the Court cannot conclude that the Nevada Supreme Court's conclusion
4 that such information would not have a reasonable probability of changing the outcome
5 was objectively unreasonable. The Court agrees that Petitioner has not made a sufficient
6 showing on this front—specifically that more investigation would have led to a more
7 favorable plea bargain. Accordingly, the Court will not grant relief with respect to Ground
8 2.

9 E. Ground 3(1)

10 In Ground 3(1), Burgon claims he received ineffective assistance of his trial
11 counsel in violation of his federal constitutional rights, because his trial counsel failed “to
12 advise Burgon about the mandatory violent habitual felon statute.” See Amended Petition
13 (ECF No. 36), pp. 22–27. He claims that his trial counsel “never distinguished the
14 discretionary and mandatory nature of the habitual criminal statutes to Burgon at any time
15 during his representation.” Id. at 23. And, he claims that his trial counsel “fail[ed] to advise
16 Burgon that his two qualifying prior convictions would in fact expose him to the mandatory
17 violent habitual felon statute.” Id. at 23–24.

18 Burgon asserted this claim in state court, and the Nevada Supreme Court affirmed
19 the denial relief on the claim, as follows:

20 ... [A]ppellant argues that his trial counsel was ineffective for inducing
21 his guilty plea with inaccurate representations about whether he qualified
22 for violent-offender habitual criminal treatment under NRS 207.212.
23 Appellant asserts that he was led to believe that he did not qualify for violent-
24 offender habitual criminal treatment. In support, appellant argues that trial
25 counsel's statement during the plea canvass that the State would need to
26 provide proof of the prior convictions indicates that counsel did not believe
27 that there were two qualifying convictions. Appellant further notes that
28 notice of NRS 207.212 was only included for the first time in the amended
information prepared for the plea negotiations and not in the first
information, which only notices NRS 207.010. Appellant argues that there
was no significant benefit to pleading guilty to two counts that could be
enhanced under NRS 207.012 unless there was a mistaken belief that he
was not eligible under NRS 207.012.

Appellant fails to demonstrate that his trial counsel's performance
was deficient or that he was prejudiced. Appellant fails to demonstrate that

1 trial counsel misrepresented whether he qualified for violent-offender
2 habitual criminal treatment under NRS 207.012. The documents provided
3 to this court show that appellant entered a guilty plea with the understanding
4 that the State was seeking violent-offender habitual criminal treatment.
5 Despite the fact that the first information only contained a citation to NRS
6 207.010, appellant was provided notice of NRS 207.012 in the written guilty
7 plea agreement, the amended information, and during the plea canvass.
8 Further, the State mentioned in the justice court that appellant faced
9 mandatory, violent-offender habitual criminal treatment. The fact that trial
10 counsel reiterated the State's duty to present proof of the prior convictions
11 cannot reasonably be interpreted in the manner suggested by appellant.
12 Further, contrary to the assertion of appellant, he received a benefit by entry
13 of his guilty plea as he avoided two additional felony counts. Under these
14 circumstances, appellant fails to demonstrate that there was a reasonable
15 probability that he would not have entered a guilty plea and would have
16 insisted on going to trial.

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Order of Affirmance, Exh. 64, p. 4 (ECF No. 11-18, p. 5). The Court finds that this ruling
by the Nevada Supreme Court, was reasonable.

The second amended information, which set forth the charges to which Burgon
pled guilty, stated:

Defendant Clay Merritt Burgon, hereinbefore named, is placed on
notice that, in accordance with the authorization of NRS 207.012 and/or
207.010, punishment imposed pursuant to the above-stated habitual felon
statute is mandatory if said Defendant is found guilty on the primary
offenses of robbery with use of a deadly weapon and burglary while in
possession of a firearm and discretionary pursuant to NRS 207.010, if said
Defendant is found guilty on the primary offenses of possession of firearm
by ex-felon and stop required on signal of police officer, for which the
Defendant is presently charged, as Defendant Clay Merritt Burgon has
previously been convicted of two (2) violent prior felony offenses, as stated
in 207.012(2), to wit:

1. That in 2000, the Defendant was convicted in the United
States District Court, District of Nevada, for the crime of armed bank
robbery, Case CR-S-99-163-JBR(RJJ).

2. That in 2005, the Defendant was convicted in the Eighth
Judicial District Court, in and for the County of Clark, State of Nevada, for
the crime of robbery, in Case No. C213257.

In addition, NRS 207.012(2) provides, in relevant part, "that the
District Attorney shall include a count under this section in any information
or shall ... file a notice of habitual criminality if an Indictment/Information is
found." Furthermore, NRS 202.012(3) provides that the trial judge may not
dismiss a count under this section that is included in the indictment or
information.

Second Amended Information, Exh. 18, p. 4 (ECF No. 9-18, p. 5).

1 The Guilty Plea Agreement, which was signed by Burgon, stated:

2 The State retains the full right to argue, including for consecutive
3 time, under the mandatory Large Habitual provision of NRS 207.012. The
4 State specifically retains the right to argue for a term of LIFE *without* the
5 possibility of parole. Additionally, I hereby acknowledge that each of the
6 above counts to which I am pleading guilty require the Court to sentence
me as a Large Habitual Felon pursuant to NRS 207.012 based on my prior
robbery convictions.

6 * * *

7 Further, I understand that the Court must sentence me pursuant to
8 NRS 207.012 to one of the following for each count: LIFE without the
9 possibility of parole; life with the possibility of parole, parole eligibility begins
10 after a minimum term of TEN (10) years has been served; or a definite term
of TWENTY FIVE (25) years, parole eligibility begins after a minimum of
TEN (10) years has been served.

11 Guilty Plea Agreement, Exh. 19, pp. 1–3 (ECF No. 9-19, pp. 2–4) (emphasis in original).

12 And then, in the court's canvass of Burgon regarding his plea, Burgon
13 acknowledged that he had received a copy of the second amended information, including
14 "the habitual criminal language included with it." Reporter's Transcript of Plea, Exh. 20,
15 pp. 5–6 (ECF No. 9-20, pp. 6–7). And, Burgon stated that he read and understood the
16 guilty plea agreement and agreed to it. Id. at 4–5, 7 (ECF No. 9-20,
17 pp. 5–6, 8). Furthermore, in the course of plea canvass the judge stated:

18 State retains the right to argue, including for consecutive time under
19 the mandatory large habitual conditions of 207.012. Specifically retain the
right to argue for life without the possibility of parole.

20 The Defendant acknowledges that the above counts he's going to
21 plead to require sentencing under the large habitual felon, 207.012.

22 Id. at 3 (ECF No. 9-20, p. 4). And, the following exchange occurred during the canvass:

23 THE COURT: Furthermore, you understand that in your case it
24 would appear that you are eligible for treatment as a habitual criminal.

25 And under the large habitual criminal statute you could be sentenced
26 on each of those charges, up to life in the Nevada Department of Prisons,
without the possibility of parole.

27 [THE DEFENDANT]: Yes, sir.

28 THE COURT: And/or you could be sentenced to life with the
possibility of parole after 10 years has been served.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Or you could be sentenced to 25 years with a
3 minimum 10 years before parole eligibility.

4 THE DEFENDANT: Yes, sir.

5 THE COURT: You understand under habitual criminal statute as
6 well, depending upon the nature of your prior convictions, and if I
7 understand it correctly you do qualify for this because they are both
8 convictions for robbery, there is a mandatory adjudication as a large
9 habitual criminal.

10 THE DEFENDANT: Yeah. Yes, sir.

11 THE COURT: Do you have any questions for myself or your attorney
12 before I accept your plea.

13 THE DEFENDANT: No. sir.

14 THE COURT: You further understand that sentencing is completely
15 up to the court. No one is in a position to offer or guarantee you leniency or
16 any particular sentence at the time of sentencing.

17 THE DEFENDANT: I do, sir.

18 Id. at 8–9 (ECF No. 9-20, pp. 9–10).

19 In this Court's view, Burgon's argument that he would not have pled guilty if his
20 counsel had adequately explained to him the operation of the habitual criminal sentencing
21 statute is belied by the record and is meritless. The Nevada Supreme Court's ruling on
22 this claim was not contrary to, or an unreasonable application of, Strickland, or any other
23 clearly established federal law, and did not result from an unreasonable determination of
24 the facts in light of the evidence. The Court will deny relief with respect to Ground 3(1).

25 F. Ground 4

26 In Ground 4, Burgon claims that he did not enter his guilty plea knowingly,
27 intelligently or voluntarily, in violation of his federal constitutional rights. See Amended
28 Petition (ECF No. 36), pp. 28–30. Burgon generally claims that this was because of his
29 mental disorders in combination with ineffective assistance of his trial counsel. See id.

30 In the order on the motion to dismiss, the Court ruled that Burgon asserted part,
31 but not all, of this claim in state court. In state court, Burgon asserted the claim that his
32 plea was not entered knowingly, intelligently or voluntarily, because of faulty advice

1 from his counsel regarding the possibility that he could be sentenced pursuant to NRS §
2 207.012. See Order entered March 19, 2018 (ECF No. 58), p. 11; see also Appellant's
3 Opening Brief, Exh. 59, pp. 28–31 (ECF No. 11-13, pp. 34–37); Appellant's Reply Brief,
4 Exh. 63, pp. 3–7 (ECF No. 11-17, pp. 8–12). That portion of Ground 4 is exhausted.
5 However, the remainder of Ground 4 was not asserted in state court.

6 The Nevada Supreme Court affirmed the denial of relief on the exhausted part of
7 the claim in Ground 4 without any discussion. See Order of Affirmance, Exh. 64 (ECF No.
8 11-18).

9 The federal constitutional guarantee of due process of law requires that a guilty
10 plea be knowing, intelligent and voluntary. See Brady v. United States, 397 U.S. 742, 748
11 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); United States v. Delgado-Ramos,
12 635 F.3d 1237, 1239 (9th Cir. 2011). "The voluntariness of [a petitioner's] guilty plea can
13 be determined only by considering all of the relevant circumstances surrounding it."
14 Brady, 397 U.S. at 749. Those circumstances include "the subjective state of mind of the
15 defendant" Iaea v. Sunn, 800 F.2d 861, 866 (9th Cir. 1986). Addressing the "standard
16 as to the voluntariness of guilty pleas," the Supreme Court stated:

17 (A) plea of guilty entered by one fully aware of the direct consequences,
18 including the actual value of any commitments made to him by the court,
19 prosecutor, or his own counsel, must stand unless induced by threats (or
20 promises to discontinue improper harassment), misrepresentation
(including unfulfilled or unfulfillable promises), or perhaps by promises that
are by their nature improper as having no proper relationship to the
prosecutor's business (e.g. bribes).

21 Brady, 397 U.S. at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir.
22 1957) (en banc), rev'd on other grounds, 356 U.S. 26 (1958)); see also North Carolina v.
23 Alford, 400 U.S. 25, 31 (1970) (noting that the "longstanding test for determining the
24 validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice
25 among the alternative courses of action open to the defendant.'"). In Blackledge v. Allison,
26 431 U.S. 63 (1977), the Supreme Court addressed the evidentiary weight of the record of
27 a plea proceeding when the plea is subject to a collateral challenge. While noting that the
28 defendant's representations at the time of his guilty plea are not "invariably

1 insurmountable” when challenging the voluntariness of his plea, the Court stated that,
2 nonetheless, the defendant’s representations, as well as any findings made by the judge
3 accepting the plea, “constitute a formidable barrier in any subsequent collateral
4 proceedings” and that “[s]olemn declarations in open court carry a strong presumption of
5 verity.” Blackledge, 431 U.S. at 74; see also Muth v. Fondren, 676 F.3d 815, 821 (9th Cir.
6 2012); Little v. Crawford, 449 F.3d 1075, 1081 (9th Cir. 2006).

7 As is discussed above with respect to Ground 3(1), the record reflects clearly that
8 Burgon knew, when he pled guilty, that he could be sentenced pursuant to NRS §
9 207.012. There was plainly a reasonable basis for the Nevada Supreme Court’s ruling,
10 affirming the denial of relief on the claim in the exhausted portion of Ground 4. See
11 Harrington, 562 U.S. at 98 (“Where a state court’s decision is unaccompanied by an
12 explanation, the habeas petitioner’s burden still must be met by showing there was no
13 reasonable basis for the state court to deny relief.”).

14 Turning to the remainder of Ground 4, which was not asserted by Burgon in state
15 court, that part of Ground 4 is subject to denial as procedurally defaulted unless Burgon
16 can show cause and prejudice such as to overcome the procedural default. However,
17 because this is not a claim of ineffective assistance of trial counsel, Martinez does not
18 apply, and ineffective assistance of state post-conviction counsel cannot operate as
19 cause. Burgon has not asserted any other sort of cause for the procedural default.
20 Therefore, this part of Ground 4, not asserted by Burgon in state court, will be denied on
21 procedural default grounds.

22 Moreover, and in the alternative, even if Burgon could establish cause and
23 prejudice, such that the merits of this claim were properly before this Court, the Court
24 would find that Burgon does not show that his guilty plea was unknowing, unintelligent or
25 involuntary because of his mental illness and substance abuse. The Court finds that claim
26 to be completely conclusory and unsupported. See Reply (ECF No. 79), p. 14; see also
27 id. at 15. There is no showing that Burgon was unable to enter a knowing, intelligent and
28 voluntary guilty plea.

1 G. Ground 5

2 In Ground 5, Burgon claims that he received ineffective assistance of his trial
3 counsel in violation of his federal constitutional rights, because his trial counsel failed “to
4 file a notice of appeal, preserve Mr. Burgon’s right to a direct appeal, and advise Mr.
5 Burgon correctly regarding his appellate rights.” See Amended Petition (ECF No. 36), pp.
6 30–32.

7 In the ruling on the motion to dismiss, the Court determined that Burgon did not
8 raise this claim in state court. See Order entered March 19, 2018 (ECF No. 58), p. 11.
9 Therefore, this claim of ineffective assistance of trial counsel is subject to denial as
10 procedurally defaulted unless Burgon can show cause and prejudice under Martinez such
11 as to overcome the procedural default.

12 In Roe v. Flores-Ortega, 528 U.S. 470 (2000), the Supreme Court set forth specific
13 standards for determining whether counsel was ineffective for failing to file a notice of
14 appeal for a criminal defendant. If it is shown that counsel disregarded the defendant’s
15 specific instruction to file a notice of appeal, counsel’s performance was deficient. See id.
16 at 477. If the defendant did not specifically instruct counsel to appeal, then the question
17 is: “(1) whether counsel consulted with the defendant about an appeal,” and “(2) if not,
18 was failure to consult deficient performance.” United States v. Sandoval-Lopez, 409 F.3d
19 1193, 1195–96 (9th Cir. 2005). If counsel “advis[ed] the defendant about the advantages
20 and disadvantages of taking an appeal, and [made] a reasonable effort to discover the
21 defendant’s wishes,” counsel is only deficient if he or she disregarded the defendant’s
22 specific instruction regarding an appeal. Flores-Ortega, 528 U.S. at 478. If counsel did
23 not consult with the defendant regarding the possibility of an appeal, the failure to do so
24 was deficient if “there is reason to think either (1) that a rational defendant would want to
25 appeal ... or (2) that this particular defendant reasonably demonstrated to counsel that he
26 was interested in appealing.” Id. at 480.

1 In this case, the guilty plea agreement that Burgon signed stated that Burgon
2 waived his right to appeal. Guilty Plea Agreement, Exh. 19, pp. 4–5 (ECF No. 9-19, pp.
3 5–6). The guilty plea agreement stated:

4 I understand this means I am unconditionally waiving my right to a
5 direct appeal of this conviction, including any challenge based upon
6 reasonable constitutional, jurisdictional or other grounds that challenge the
7 legality of the proceedings as stated in NRS 177.015(4). However, I remain
free to challenge my conviction through other post-conviction remedies
including a habeas corpus petition pursuant to NRS Chapter 34.

8 Id. at 5 (ECF No. 9-19, p. 6). The guilty plea agreement stated that Burgon signed it after
9 consultation with his counsel, and his counsel thoroughly explained to him the waivers of
10 rights in the agreement. Id. at 5–6 (ECF No. 9-19, pp. 6–7). And, at the plea canvass, in
11 open court, Burgon confirmed that he read the guilty plea agreement, that he specifically
12 discussed with his attorney the rights he waived, including the right to appeal, and that he
13 believed he understood the agreement. See Reporter’s Transcript of Plea, Exh. 20, p. 7
14 (ECF No. 9-20, p. 8). This is substantial evidence that Burgon’s counsel consulted with
15 him regarding his right to appeal from the judgment of conviction, and that Burgon did not
16 indicate that he wished to retain his right to appeal. Burgon does not make any showing
17 to the contrary. There is no showing that a reasonable defendant in Burgon’s position
18 would want to appeal, and there is no showing that Burgon reasonably demonstrated to
19 his counsel that he was interested in appealing.

20 Furthermore, even if Burgon did show that his counsel performed deficiently in not
21 filing a notice of appeal—and the Court finds that he does not—the Court would find that
22 there is no showing of prejudice. Burgon’s assertion, in his amended petition, that he had
23 potentially meritorious bases for appeal is, in its entirety, as follows:

24 Trial counsel could have appealed the unconditional waiver of his
25 preliminary hearing; the trial court’s denial of his motion to suppress
26 evidence of prior conviction; the voluntariness of his plea; the application of
27 the mandatory violent habitual felon statute; and the imposition of the
28 sentence of twenty years to life, among other meritorious issues. Trial
counsel could have especially appealed the voluntariness of Burgon’s
waiver of his preliminary hearing and guilty plea, given his mental disorders,
as well as the prescription medications that he was taking during all of his
hearings. [Footnote: While the trial court asked Burgon rote questions about

1 his ability to understand the plea during his guilty plea canvass on March 3,
2 2011, ECF No. 9-20, Ex. 20, it was alerted to his mental disorders in
3 advance of (and during) the sentencing hearing on May 5, 2011, and should
4 have inquired further into Burgon's ability to understand the plea before
5 proceeding with the sentencing hearing approximately two months later,
6 ECF No. 9-21, Ex. 21.] Moreover, trial counsel knew that Burgon had
7 received the middle range of the sentences that were available pursuant to
8 the mandatory violent habitual felon statute, and he could have, at minimum,
9 received a sentence of ten to twenty-five years. Trial counsel was also
10 aware of the court's denial of Burgon's motion to suppress, and how the
11 order may have affected Burgon's decision to plead guilty.

12 Amended Petition (ECF No. 36), pp. 31–32. Burgon falls far short of showing that there
13 were grounds for an appeal with a reasonable probability of success. Burgon does not
14 make a showing that he was prejudiced by his counsel's alleged deficient performance in
15 not filing a notice of appeal on his behalf.

16 Therefore, the Court determines that Burgon's state post-conviction counsel was
17 not ineffective for not asserting this claim, and, consequently, Burgon does not show
18 cause and prejudice, such as to overcome the procedural default. The Court will deny the
19 claim in Ground 5 on procedural default grounds.

20 H. Ground 6

21 In Ground 6, Burgon claims that he received ineffective assistance of his trial
22 counsel in violation of his federal constitutional rights, because his trial counsel failed “to
23 advise him against unconditionally waiving his preliminary hearing without plea
24 negotiations pending.” See Amended Petition (ECF No. 36), pp. 30–32.

25 In the ruling on the motion to dismiss, the Court determined that Burgon did not
26 assert this claim in state court. See Order entered March 19, 2018 (ECF No. 58), p. 12.
27 Therefore, with regard to this claim too, Burgon must show cause and prejudice, such as
28 to overcome the procedural default under Martinez, or the claim is subject to denial as
procedurally defaulted.

The Court finds this claim of ineffective assistance of trial counsel to be meritless.
Burgon makes no allegation whatsoever, and does not proffer any evidence showing,
how there would have been a reasonable probability of a better outcome for him if he had
not waived the preliminary hearing. It is apparent from the police reports that the

prosecution had ample evidence supporting the charges against Burgon. See Justice Court Records, Exh. 1 (ECF No. 9-1, pp. 3–8). Without any colorable suggestion of prejudice to Burgon resulting from the waiver of the preliminary hearing, Burgon’s ineffective assistance of counsel claim is insubstantial, and his state post-conviction counsel was not ineffective for failing to assert such a claim. Burgon does not make a showing to overcome the procedural default of Ground 6 under Martinez. Ground 6 will be denied as procedurally defaulted.

I. Certificate of Appealability

The standard for the issuance of a certificate of appealability requires a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c). The Supreme Court has interpreted 28 U.S.C. § 2253(c) as follows:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000); see also James v. Giles, 221 F.3d 1074, 1077-79 (9th Cir. 2000). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Id. Applying this standard, the Court finds that a certificate of appealability is unwarranted in this case. The Court will deny Burgon a certificate of appealability.

IV. Conclusion

IT IS THEREFORE ORDERED that the Amended Petition for Writ of Habeas Corpus (ECF No. 36) is **DENIED**.

IT IS FURTHER ORDERED that Petitioner is denied a certificate of appealability.

DATED THIS 15th day of July, 2020.

23